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No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1958

EDGAR B. SIMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The oral opinion of the District Court (R. 25–26) is not reported. The opinion of the Court of Appeals (R. 28–37) is reported at 252 F. 2d 434.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1958 (R. 37–38). The petition for rehearing (R. 38–40) was denied on March 13, 1958 (R. 40). The petition for certiorari was filed on June 7, 1958, and was granted on October 13, 1958 (R. 41). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether a state official is personally liable for his refusal, after service on him of notice of levy and demand, to surrender accrued wages owed by the state to delinquent federal income taxpayers.

STATUTE INVOLVED

The pertinent portions of Section 6321, 6331 and 6332 of the Internal Revenue Code of 1954 are as follows:

> SEC. 6321. LIEN FOR TAXES.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
>
> (26 U.S.C., Supp. V, 6321.)
>
> SEC. 6331. LEVY AND DISTRAINT.
>
> (a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued

salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * * *

(26 U.S.C., Supp. V, 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal

to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) *Person Defined.*—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

(26 U.S.C., Supp. V, 6332.)

Also involved are Article I, Section 8 and Article VI, Clause 2 of the Constitution, Sections 6334 and 7403 of the Internal Revenue Code of 1954, and Section 301.6331–1 of the Treasury Regulations (1954), the pertinent portions of which are printed in the Appendix A, *infra*, pp. 41–43.

STATEMENT

Suit was instituted by the United States against Edgar B. Sims, individually and as State Auditor of the State of West Virginia, for judgment, pursuant to Section 6332 of the Internal Revenue Code of 1954 (*supra*, pp. 3–4), for failure to honor federal liens and levies on the accrued wages of certain state employees for unpaid federal income taxes owed by such employees (R. 1–9). A motion to dismiss was denied by the District Court except to the extent of dismissing the action against the petitioner in his official capacity (R. 11). He thereupon answered the complaint denying any liability (R. 13–14). Judgment

for the United States was entered in the amount of $519.71 plus interest (R. 18) and the judgment was affirmed on appeal (R. 37–38).

The facts were stipulated (R. 14–17) and may be stated as follows:

Three employees of the State of West Virginia—Henry Hart, Alvin S. Alexander and Kathleen Wheeler—were indebted to the United States for unpaid income tax deficiencies[1] (R. 14–15). Henry Hart owned $1,562.61 in income taxes for the years 1946, 1950 and 1951 (R. 14); Alvin S. Alexander owed $228.64 in income taxes for 1953 (R. 15); and Kathleen Wheeler owed $84.56 in income taxes for 1953 (R. 15).

Assessments of the income tax deficiencies were made by the Commissioner of Internal Revenue and forwarded to the Director of Internal Revenue at Parkersburg, West Virginia, for collection. The Director demanded payment from each taxpayer. After ten days had elapsed and the taxes were not paid, the Director levied upon the salaries due to each taxpayer from the State of West Virginia. The levies were made by notices of levy addressed either

[1] Although the complaint also sought judgment in respect of the unpaid taxes of two other state employees—Elbert M. Henderson, Sr., and Willie R. Childers—the stipulation of the parties (R. 17) intentionally omitted any reference to those claims because the petitioner was unable to locate the relevant records of those persons' wage payments.

The record does not specifically so show, but the tax deficiencies were apparently chiefly on income other than that received from the State, since the taxpayers' salaries from the State were subject to the withholding tax. (See Br. 10.)

to the State of West Virginia or to the petitioner and served upon the petitioner (R. 14–16).

These notices of levy were given upon established forms which specify the exact amounts due from the taxpayer, give notice of the lien of the United States, make a levy and seizure of property of the taxpayer in the possession of the person notified, and demand payment. The form, 668–A, reads in relevant part as follows (R. 19–20):[2]

> You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.

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[2] This record reference is to the notice served on the petitioner with respect to Henry Hart, and is representative of all the notices. The back of the form, not set forth in the record, prints the text of Sections 6321, 6322, 6331, 6332, 6333 and 6334 of the Internal Revenue Code of 1954.

Notices of levy were first served on the petitioner, the state auditor, on October 27, 1955, with regard to Wheeler and Alexander and on December 14, 1955, with regard to Henry Hart (R. 15–16). As of those dates, the three taxpayers had accrued "take-home" pay due from the state in the total amount of $519.71 (R. 16, pars, 6, 8, 10).

The notices of levy were not honored and second notices of lien and levy, incorporating final demands for payment, were served upon the petitioner on November 7, 1955, with regard to Alexander and Wheeler, and on December 16, with regard to Hart (R. 16–17).[3]

Notwithstanding these successive notices of levy, the petitioner paid over to the employees their accrued take-home pay (R. 16). He states (Br. 25) that in refusing to honor the levies he acted upon the advice of the office of the Attorney General of West Virginia.

SUMMARY OF ARGUMENT

In contending that the courts below erred in holding that he is personally liable for his refusal to honor the federal income tax levies, the petitioner relies on his status as a state officer and asks this Court to hold that states are excluded from the application of the

[3] This notice is not set forth in the record, but final demand is a standard form (Form 668C) which advises of the prior notice of lien and levy and calls attention to Section 6332(b) of the Code imposing personal liability upon any person in possession of the property or rights to property subject to levy upon which a levy has been made who fails or refuses to surrender the property. A copy of this form is attached to this brief as Appendix B, *infra*, p. 44.

pertinent statutes because they are not "persons" within the meaning of the Internal Revenue Code and that in any event the petitioner was not personally liable for his official acts. In brief, the petitioner argues that Congress limited the federal power to collect taxes insofar as state employees are concerned. The petitioner makes no express argument based on federal-state relations or Constitutional immunity.

1. The basic statutory provisions are Sections 6321 and 6331(a) of the Internal Revenue Code of 1954, *supra*, pp. 2–3, which provide for a lien and levy upon "all property and rights to property" of a delinquent taxpayer, with exceptions which do not include salaries and wages either of state employees or of others. These lien and levy provisions are general in application and make exemption dependent upon the type of property involved rather than on who has possession of it. Since the salaries and wages of state employees are subject to the imposition and collection of federal taxes, just as any other salaries and wages, and no burden on the states is involved, these lien and levy provisions necessarily apply to the salaries and wages of state employees, as the pertinent Treasury Regulations specifically provide. Indeed, to interpret them otherwise would be to assume that Congress, despite its paramount power to lay and collect taxes, has exempted from levy, in aid of the collection of federal taxes, property which in the majority of states is even subject to being reached for the payment of debts owed by state employees to private creditors.

The pertinent provisions for enforcement of the federal tax liens and levies, contained in Section 6332

of the Code, apply to "[a]ny person" in possession of property or rights to property subject to levy, require the surrender of such property pursuant to levy, and impose personal liability on "[a]ny" such person who fails or refuses to honor a levy upon such property, in a sum equal to the value of the property but not to exceed the amount of taxes which are the subject of the levy. The state of West Virginia as principal is the "person" who had possession of the accrued salaries of the three delinquent taxpayers upon which levies were made, the petitioner is the "person" who was obligated to surrender such accrued salaries pursuant to the levies, and the "person" who refused to do so and who has incurred personal liability therefor. His only defense is that he was acting as an officer of the state, rather than as an individual, and that the provisions of Section 6332 accordingly do not apply to him.

But no constitutional immunity is involved and Section 6332 makes no distinction between a state and any other person holding leviable property. Contrary to the petitioner's argument, no purpose to exclude a state can be implied from the fact it is not expressly included in the definition. The petitioner is arguing for a rule of statutory construction which would *exclude* states by implication, whereas the rule is already well settled that states are *included* in the general language of federal statutes, and particularly in the word "person", unless a contrary intent is indicated. No contrary intent exists or can be assumed in respect of revenue measures, as decisions of this Court attest, and that is equally true where, as here, the

word "person" is defined with reference to corporations and partnerships without mentioning states. Here, no less than in other contexts, there is no reason to exempt a state or state officer "from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States* v. *California,* 297 U.S. 175, 186; *California* v. *Taylor,* 353 U.S. 553, 562–563.

2. Since the salaries owed to the delinquent taxpayers by the state were subject to levy and since it is not disputed that the petitioner is the state official authorized to determine whether the payments were to be made to the employees or paid over to the Director of Internal Revenue pursuant to the demand, the statutory scheme imposes personal liability on the petitioner for disregarding the notice served on him. Thus, Section 6332(b) of the Internal Revenue Code makes the person who refuses to surrender property properly demanded from him "liable in his own person and estate." And Section 6332(c) makes it clear that this liability is to be imposed on a person acting as an agent since it specifically points to officers or employees of corporations. Whether the principal, here the state itself, would be liable depends upon whether the agent was acting within his authority, but the liability of the officer who actually disregarded the demand is clear.

In the final analysis, the petitioner's complaint is simply that he has been subjected to personal liability while acting as a state officer. But that this in itself

is not enough to avoid liability is well established. *South Carolina* v. *United States*, 199 U.S. 437; *Allen* v. *Regents*, 304 U.S. 439. Where there is no burden on the states in performing their governmental functions, there is no real problem in federal-state relations.

Moreover, the petitioner's violation of federal law was needless; he was a mere stakeholder who could have held the warrants for payment of the accrued salaries of the delinquent taxpayers and awaited a judicial determination of the conflicting claims of the United States and the employees. Instead he chose to refuse to honor the federal levies with notice that to do so would result in the imposition of personal liability.

ARGUMENT

This case involves the application of the provisions of the federal internal revenue laws with respect to the collection of taxes. The delinquent taxpayers are three employees of the State of West Virginia. The federal tax authorities sought to collect their unpaid federal income taxes by levying upon their accrued state salaries through notices of lien and levy served upon the petitioner, the state auditor. That he was the proper person to be served with the notices is not disputed.[4] He nevertheless refused to honor the notices of levy and, instead, defeated them by paying out the salaries to the delinquent employees. Called to account for his action by suit filed against him for

[4] The delinquent state employees' salaries were payable by warrants issued the state auditor. He was charged with the duty of issuing such warrants and, if he did not perform that

judgment in the amount of the taxes covered by the notices of levy, he seeks to avoid the personal liability therefor imposed upon him by Section 6332(b) of the Internal Revenue Code of 1954, *supra*, p. 3, by arguing that the pertinent statutory provisions are inapplicable to a state and that he cannot be held personally liable for an act performed within the scope of his official authority as a state official. He makes no contention expressly based on Constitutional immunity considerations, but at points his argument contains Constitutional overtones. Our argument will therefore include a showing that no burden on the state or Constitutional immunity is involved and no problem of federal-state relations is posed.

I

THE ACCRUED SALARIES OF STATE EMPLOYEES MAY BE LEVIED UPON AND COLLECTED TO SATISFY DELINQUENT FEDERAL TAXES

Apart from the Constitutional issue, discussed in Point C below, there are two questions of statutory interpretation. The first, dealt with in Point A, is whether the state's obligation to its employees is subject to the federal lien which attaches to the property

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duty, its performance could be enforced by a writ of mandamus. *Board* v. *Sims*, 136 W. Va. 789. Under the laws of West Virginia the state auditor is also the person required to withhold federal taxes from the salaries of state employees and to pay all taxes required by federal law. 1 West Virginia Code of 1955, Section 1031 (1). Had a judgment creditor wished to garnishee the wages of these employees, the execution would have had to be issued against the state auditor. 2 West Virginia Code of 1955, Section 3834(18).

rights of delinquent taxpayers. The second, discussed in Point B, is whether the provisions of Sections 6332 of the Internal Revenue Code, imposing a duty to make payment to the United States on demand, applies to the states.

A. THE STATUTORY PROVISIONS FOR LIENS AND LEVIES FOR UNPAID TAXES APPLY TO THE ACCRUED SALARIES OF STATE EMPLOYEES

Section 6321 of the 1954 Code, *supra,* p. 2, provides in comprehensive terms that the United States shall have a lien for the amount of any unpaid taxes upon "all property and rights to property" of a taxpayer. To enforce the lien, when any tax is unpaid for ten days after notice and demand, Section 6331(a) authorizes the tax authorities to collect the tax by "levy upon all property and rights to property" belonging to the taxpayer, except such property as is exempt under Section 6334 (Appendix A, *infra,* pp. 41–42) and the latter section states in subsection (c) that "no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." The exemptions do not include salaries or wages which are, of course, "property" or "rights to property" subject to levy. *Glass City Bank* v. *United States,* 326 U.S. 265, 268; 9 Mertens, *Law of Federal Income Taxation* (Rev.), Sec. 49.205. West Virginia law itself so holds. See *Roberts & McInnis* v. *Emery's Motor Coach Lines* (W. Va. Cir. Ct.), decided September 16, 1950, 50–2 U.S.T.C. par. 9455.

There is no suggestion in the statute that any exemption was intended because the salaries or wages are due to an employee from a state rather than from

a private employer. These lien and levy provisions originated in the Act of July 13, 1866, c. 184, 14 Stat. 98, 107,[5] and are basic to the entire scheme of collection of federal taxes. It is clear from their history that they are all-inclusive and that there are no exceptions or exemptions whatever, save those specified in the statutes. *Fink* v. *O'Neil,* 106 U.S. 272; *United States* v. *Heffron,* 158 F. 2d 657 (C.A. 9), certiorari denied, 331 U.S. 831. Section 6321 imposes "a sweeping lien 'upon all property or rights to property' ". *Blacklock* v. *United States,* 208 U.S. 75, 85. The Court of Appeals for the District of Columbia Circuit has stated that "The language unquestionably encompasses money belonging to a taxpayer, in whatever hands it may be." *Welsh* v. *United States,* 220 F. 2d 200, 202. The Tenth Circuit has said that "The statute covering collection of taxes is broad and comprehensive and Congress intended to subject all of

[5] This Act provided:

> * * * And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company, or corporation; and the collector, after demand, may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property belonging to such person, bank, association, company, or corporation, on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for non-payment, and also of such further sum as shall be sufficient for the fees, costs and expenses of such levy. * * *

a taxpayer's property, except that specifically exempt from the payment of taxes." *Citizens State Bank of Barstow, Tex.* v. *Vidal,* 114 F. 2d 380, 382. A West Virginia state judge, deciding that the federal tax lien is superior to a garnishee summons (before the decision of this Court in *United States* v. *Liverpool & London Ins. Co.,* 348 U.S. 215) stated that "The federal statute could hardly have used more inclusive terms." *Roberts & McInnis* v. *Emery's Motor Coach Lines* (W. Va. Cir. Ct., decided Sept. 16, 1950, 50-2 U.S.T.C. par. 9455). This Court has itself noted the sweep of the language. "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States,* 326 U.S. 265, 267.

Although there are no reported cases dealing with the attachment of federal tax liens to a state's obligation to pay salaries, in comparable situations where a state owes debts or holds property for an individual it has been held that the right, or property, is subject to the federal lien. *Welsh* v. *United States,* 220 F. 2d 200 (C.A.D.C.); *United States* v. *Graham,* 96 F. Supp. 318 (S.D. Cal.), affirmed *per curiam sub nom. California* v. *United States,* 195 F. 2d 530 (C.A. 9), certiorari denied, 344 U.S. 831; *United States* v. *Newhard,* 128 F. Supp. 805 (W.D. Pa.). In *United States* v. *City of New York,* 82 F. 2d 242 (C.A. 2), although it was held that the property need not be surrendered to the United States because it was not in "possession" of the state, the court also declared that, had it been held by the state, it would have been subject to the lien.

The present Treasury Regulation, Sec. 301.6331–1 (a)(4), Appendix A, *infra*, p. 43, specifically provides:

> Accrued salaries, wages, or other compensation of any officer, employee, or elected or appointed official of a State or Territory, or of any agency, instrumentality, or political subdivision thereof, are also subject to levy to enforce collection of any Federal tax.

It is of course indisputable that Treasury Regulations within the framework of the Code have the force of law, *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, and that in interpreting the Code such regulations are given great weight. *Brewster* v. *Gage*, 280 U.S. 327; *Commissioner* v. *Wheeler*, 324 U.S. 542.

Petitioner completely ignores the language of Sections 6331(a) and 6334(c), but nevertheless implies (Br. 12) that the court below had doubts as to whether Congress intended to authorize levies on the accrued salaries of State employees. The court below entered an order requesting the parties to file supplemental briefs setting forth the legislative history of the pertinent sections of the Code and any available information as to the administrative practice in respect of an intent to authorize the filing of liens and notices of levy upon the accrued income of state employees (R. 27), but that was because petitioner made two arguments in the court below which were later answered so completely in the court's opinion (R. 31–34) that they have not been renewed in this Court.

One of these arguments was to the effect that Congress should be deemed to have acquiesced in a long-standing administrative interpretation of the statute as not authorizing levy upon the salaries of State employees. But, as the opinion below shows (R. 31–33), there had been no authoritative ruling to that effect which had been followed administratively or of which Congress was aware; it was only the exact opposite administrative interpretation which Congress could have ratified, for that was the only administrative interpretation of which it had knowledge.[6]

The other argument made below but not renewed here, except impliedly (see Br. 10–11), was that the express authorization in Section 6331(a) for levy upon the accrued salaries of employees of the federal government and the omission of reference to state employees indicates an intent to withhold authorization with respect to the latter. But, as the court

[6] The alleged interpretation of the statute holding that accrued state salaries could not be distrained consisted of a single Income Tax Unit Ruling (I.T. 2405, VII–1 Cum. Bull. 72) issued in 1928 with respect to reaching accrued salary in the possession of a city treasurer. The ruling was that the funds could not be reached. However, this was an isolated ruling not called to the attention of Congress and not followed by the Internal Revenue Service itself, as the court below pointed out (R. 32–33). It is well established that such rulings are not binding on the government. See *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 468; *United States* v. *Higginson*, 238 F. 2d 439, 446 (C.A. 1). And it is far more likely that Congress had the present interpretation of the government in mind, than the single out-of-date and unauthoritative ruling cited above. Moreover, the ruling was issued at the time when it was thought that salaries of state employees were immune from taxation. See 9 Mertens, *Law of Federal Income Taxation* (Rev.), Sec. 49.205.

below noted (R. 34), the legislative history of Section 6331 does not reveal any such negative intent. The specific reference in Section 6331 to levy upon federal employees' salaries has a more likely explanation in a problem peculiar to the federal government, explained by the court below (R. 34), which made the provision regarding levy upon federal employees' salaries necessary in order to subject federal employees to the same collection procedures available against all other taxpayers, including state employees.[1]

In view of the prevelant state practice which subjects funds owed to state employees to attachment by creditors generally, it would be strange to interpret the federal law authorizing levy upon "all" property of a delinquent taxpayer (Section 6331(a), *supra*, p. 2) so as not to permit the use of the federal collection procedures in a situation where the state procedures would be available to the United States as well as other creditors. It is well established that the United States may, though it is not required to, use state remedies for the collection of debts owing to it, including delinquent taxes. *United States* v. *Bess*, 357 U.S. 51; *Blacklock* v. *United States*, 208 U.S. 75; *United States* v. *Manufacturers*

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[1] Treating a tax levy on a federal salary as a setoff, the Comptroller General had ruled that federal administrative officials had no authority to withhold salaries by reason of a levy. 26 Comp. Gen. 907, 912.

Trust Co., 198 F. 2d 366 (C.A. 2).[8] However, a levy on the property pursuant to Section 6331(a) is the method specifically provided by Congress for the collection of taxes and there appears no reason of policy for implying an exception in the case of the collection out of salaries due to state employees, when the states permit debts owed to private creditors to be collected out of such salaries. By and large the old policy that the salaries of public officers and employees were not subject to garnishment has been adandoned, either wholly or in part, by statutes enacted by thirty-two of the states, including West Virginia.[9] And the state courts have held that the

[8] In the *Manufacturers Trust Co.* case the court stated that "However, the remedy of the government to enforce collection of taxes by the summary administrative method of distraint is not so limited in its effect and is a special privilege it has which is analogous to, but in addition to, garnishment and other remedies of an ordinary creditor."

[9] In the years given after the section number, the following 25 states have completely abandoned the old policy and provided that the state and all its subdivisions shall be subject to garnishment of the salaries of their employees:

Arizona, Revised Statutes (1956) 12–1601 (1929);
Arkansas, Statutes (1947) 31–519 (1945);
Connecticut, General Statutes (1949) 8102(c)(d)(e) (1939);
Delaware, Code Annotated (1953) 10:3503 (1942);
Kansas, General Statutes (1949) 60–962 (1919);
Kentucky, Revised Statutes (1958) 427.130 (1942);
Michigan, Statutes Annotated (1938) 27.1900 (1919);
Mississippi, Code (1942) 2789 (1936);
Missouri, Annotated Statutes (1949) 525.310 (1943);
Montana, Revised Code (1947) 93–4341 (1901);
Nebraska, Revised Statutes (1943) 25–1012 (1925);
Nevada, Revised Statutes (1957) 281.130 (1883);
New Jersey, Statutes Annotated 2A; 17–53, 54 (1915);

policy that debtors should pay their debts is a better

New Mexico, Statutes Annotated (1953) 26–2–28 (1919);
New York, Civil Practice Act, Sec. 684 (1910);
North Dakota, Revised Code (1943) 32–0901 0928 (1929);
Ohio, Revised Code Annotated (1953) 115.46, 2715:12 (1943);
Oklahoma, Statutes Annotated 12–1192 (1925);
Oregon, Revised Statutes (1953) 23.190 (1909);
South Dakota, Code (1952 Supp.) 37.2801 (1939);
Tennessee, Code Annotated (1955) 26–518 (1921, 1939);
Utah, Code (1953) 78–27–15 (1905);
Washington, Revised Code (1951), 7.32.060 (1854);
West Virginia, Constitution, Article VI, Sec. 35 (1935); 2 West Virginia Code of 1955, Sec. 3834 (15) (1939);
Wisconsin, Statutes Annotated (1957) 267.22 (except first-class cities) (1915).

Two more states have abandoned the policy except for elective officials (Idaho Code (1947) 11–202 (1939); Virginia Code (1950) 8–449.1, 2 (1900)); and two except as to those whose salaries are fixed by the constitution (California, Code of Civil Procedure, Sec. 710 (1903); Colorado, Revised Statutes (1953) 77–12–1, 2, and 3 (1927)). One state has abandoned the policy except for county officials (New Hampshire Revised Statutes Annotated (1950) 512:9 (1939); see *Frame* v. *Brown*, 98 N.H. 413), while two states have retained the immunity for all state officers and employees, but not for county, district and municipal officers and employees (Alabama Code (1940) 7–1032–6 (1923) and see *Shepherd* v. *Jones*, 228 Ala. 307; Minnesota Statutes Annotated (1945), 571.45, 46 (including state highway department employees)). Of the remaining 16 states, three have abandoned the old policy as it affects more important interests, e.g., divorce court orders and collection of state taxes (Florida Statutes (1943) 65.13, and see *Duval County* v. *The Charleston Lumber Co.*, 45 Fla. 256; Pennsylvania, by court decision, *Commonwealth* v. *Caughey*, 76 D. & C. 305, and see same rule in District of Columbia, *Montgomery* v. *Montgomery*, 153 F. 2d 634 (C.A. D.C.); North Carolina General Statutes (1947) 105.385(e); Pennsylvania, Purdon's Pt. St. Ann., 72.5685, and see *United States* v. *Newhard*, 128 F. Supp. 805 (W.D. Pa.)).

policy and just as applicable to public officers and employees and to their employer as to any other employees and their employers.[10] This Court adopted the same view in *Federal Housing Administration* v. *Burr*, 309 U.S. 242, where the Court allowed garnishment of salaries of employees of a federal agency which Congress had authorized to sue and be sued.

B. THE STATE OF WEST VIRGINIA, AS PRINCIPAL, WAS A "PERSON IN POSSESSION OF (OR OBLIGATED WITH RESPECT TO) PROPERTY OR RIGHTS TO PROPERTY SUBJECT TO LEVY" UNDER SECTION 6332 OF THE INTERNAL REVENUE CODE AND WAS THEREFORE REQUIRED TO SURRENDER THE ACCRUED WAGES ON DEMAND

Having provided in Section 6321 for a lien and in Section 6331(a) for levy upon all property and rights to property of a taxpayer for unpaid taxes, so comprehensively as to include the salaries of state employees, in Section 6332 of the Code (*supra*, pp. 3–4) Congress provided for enforcement of the levies. Subsection (a) of that Section provides that—

> *Any person* in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, * * * . [Emphasis added.]

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[10] *State* v. *Surety Finance Co.*, 42 Ariz. 42; *Ross* v. *Rich*, 210 Ark. 74; *Wilson* v. *Waters*, 19 Cal. 2d 111; *Batesville Casket Co.* v. *Fields*, 288 Ky. 104; *Franke* v. *Allen*, 199 Minn. 450; *Department of Banking* v. *Foe*, 136 Neb. 422; *Stockhard* v. *Hamilton*, 25 N.M. 240; *Rickey* v. *Slingerland*, 143 Misc. 583 (N.Y.); *Tribune Reporter Printing Co.* v. *Homer*, 51 Utah 153; *Knight* v. *People's National Bank*, 182 Va. 380; *Chadek* v. *Forest County*, 206 Wisc. 85.

Section 6332 was added to the internal revenue laws by the Revenue Act of 1926 for the express purpose of preventing the defeat of the lien of Section 6321 and the levy of Section 6331 by any person in possession of leviable property of a taxpayer.[11] It is therefore a strengthening provision, extending the ancient remedies of levy and distraint. *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366, 369 (C.A. 2). The only reported case involving the application of this provision, or its predecessor, to the states is *United States* v. *City of New York*, 82 F. 2d 242 (C.A. 2), referred to above at page 15. In that case there was an attempt to hold the city liable for property in the custody of the police property clerk which was owned by a person arrested by the police. Demand was made that it be surrendered to the United States to satisfy delinquent taxes of the person under arrest. Instead the property clerk returned it to its owner

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[11] Section 6332 was added by Section 1114(e) of the Revenue Act of 1926 (c. 27, 44 Stat. 117), as to which the Senate Committee Report (S. Rep. No. 52, 69th Cong., 1st Sess., p. 38 (1939-1 Cum. Bull. (Part 2), p. 360), stated as follows:

DISTRAINT ON PROPERTY NOT IN POSSESSION OF TAXPAYER

Section 1114(e): The existing law permits distraint upon personal property of a delinquent taxpayer even though in possession of another person. The committee amendment specifically makes it the duty of the possessor to surrender the property upon which a levy is made, and imposes upon him, in addition to any criminal liability, a civil liability, if he fails to do so, equal to the value of the property, but not exceeding the amount of tax, a liability similar to that of an executor who pays debts before he pays a debt due the United States.

and the United States sued the city. The Court of Appeals for the Second Circuit held that, if the property had been in the possession of the city, it would have been liable. However, it found for New York on the ground that the property clerk held the property not for the city but as agent of the criminal courts. Insofar as the case is pertinent here it supports the government's claim.

The petitioner asserts, however, that Section 6332(a) of the Internal Revenue Code does not apply because the state is not a "person." The main argument in support of this position is that the failure of Congress expressly to include the states in the statute must be taken as an indication of an intent to exclude them.[12] From the citation of *United States* v. *Cooper Corporation,* 312 U.S. 600, and *McBride* v. *Board of Commissioners,* 44 Fed. 17 (C.C. D. Wash.), it appears that the petitioner has confused the issue of whether a federal law applies to a state with the entirely different proposition that a sovereign is not comprehended within its own statutes unless specifically mentioned. Both cases cited are of the latter

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[12] The definition of "person" in Section 6332(c) *supra*, p. 4, is not an attempt to list entities which should be considered persons; its obvious purpose is to define the responsibility of persons acting in a representative capacity, an issue discussed in Point II of this brief. The general definition of "person" for the purpose of the Code is found in Section 7701(a)(1) which reads: "The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." Subsection (b) of Section 7701 provides: "The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined."

type. Contrary to the view expressed by the petitioner, it is a well-settled principle that a State, state agency or state officer or employee is included in the general terms of a federal statute, and particularly under the word "person", unless a contrary intent is indicated. See, e.g., *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411; *New York* v. *United States*, 326 U.S. 572; *Georgia* v. *Evans*, 316 U.S. 159; *Helvering* v. *Gerhardt*, 304 U.S. 405; *Ohio* v. *Helvering*, 292 U.S. 360; *South Carolina* v. *United States*, 199 U.S. 437; *Welsh* v. *United States*, 220 F. 2d 200 (C.A. D.C.); *California* v. *United States*, 195 F. 2d 530 (C.A. 9), certiorari denied, 344 U.S. 831 (affirming *per curiam*, *United States* v. *Graham*, 96 F. Supp. 318 (S.D. Cal.)); *United States* v. *First Capital Nat. Bank*, 89 F. 2d 116 (C.A. 8); *United States* v. *City of New York*, 82 F. 2d 242 (C.A. 2); *United States* v. *Newhard*, 128 F. *Supp.* 805 (W.D. Pa.); *Farley* v. *Manning*, 4 N.J. 571.

No contrary intent exists or is to be presumed as to statutes relating to the imposition and collection of federal taxes, and that is true even though the word "person" is defined to include a partnership or a corporation and does not mention states, state agencies or state officers. In *South Carolina* v. *United States*, 199 U.S. 437, where it was held that a tax on "every person" who sells liquor applied to state liquor stores, the Court stated (pp. 447–448):

> * * * It is true a further question is made whether the act of Congress is broad enough to include such persons. But upon this we have little doubt. Section 3232 Rev. Stat. provides: "No person shall be engaged in nor carry on

any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

Section 3244 contains these words of description:

"Every person who sells, or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors."

"Person" is also defined:

"SEC. 3140. * * * Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person', as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

Now, the dispensers were persons who sold liquors. They applied for and received the licenses. True they were acting simply as agents of the State, but if the fact that the State was the principal creates no exemption from Federal taxation then the statute reaches them because they were the actual sellers.

In *Ohio* v. *Helvering,* 292 U.S. 360, 370–371, involving a later claim of exemption under the same statute, the Court reaffirmed its decision in the *South Carolina* case but extended the definition of "person" to include the State itself. See also, *California* v. *Taylor,* 353 U.S. 553, 562–563. This rule was later followed and held to apply to a state as a "person" collecting admissions taxes (*Allen* v. *Regents,* 304 U.S. 439, rehearing denied, 304 U.S. 590), selling soft

drinks (*New York* v. *United States,* 326 U.S. 572, 586), and again in collecting admissions taxes (*Wilmette Park Dist.* v. *Campbell,* 338 U.S. 411, 416). Except for the tax on soft drinks involved in the *New York* case, the taxes on admissions and beverages involved in those decisions are still in force as sections of the 1954 Code (Sections 4231, 5122(a)) and still depend upon the meaning of the word "person" for their application to state and local agencies. Similarly, although the definition of "gross income" contained in Section 22(a) of the Revenue Act of 1932 (c. 209, 47 Stat. 169) made no reference to the salaries of State employees, their salaries were nevertheless held subject to the federal income tax in *Helvering* v. *Gerhardt,* 304 U.S. 405. And see *Graves* v. *N.Y. ex rel. O'Keefe,* 306 U.S. 466. Indeed, the pertinent legislative history [13] shows that Congress deliberately omitted any specific reference to the salaries of State officers and employees because it believed

[13] The language of the 1932 Act originated in Section 213 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, which has the following history. The Civil War Income Tax Acts construed in *The Collector* v. *Day,* 11 Wall. 113, referred only to "income of every person residing in the United States, * * * whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment or vocation, carried on in the United States or elsewhere, or from any other source whatever" (p. 113). The first three Revenue Acts after the Sixteenth Amendment, specifically exempted from federal taxation the compensation of all officers or employees of a state or political subdivision thereof. Income Tax Act of 1913, c. 16, Sec. II(B), 38 Stat. 114, 168; Revenue Act of 1916, c. 463, Sec. 4, 39 Stat. 756, 759; Revenue Act of 1917, c. 63, 40 Stat. 300. The exemption was dropped, never to be re-

they were included within the general definition of gross income long before this Court so decided. Later, in confirmation of the *Gerhardt* and *Graves* decisions, *supra,* Congress in the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574, amended the statutory definition of gross income in Section 22(a) of the 1939 Code to include "compensation for personal service as an officer or employee of a state or any political subdivison". But this express reference was eliminated from the equivalent Section 61(a) of the 1954 Code as unnecessary (S. Rep. No. 1622, 83d Cong., 2d Sess., 168, U.S.C. Cong. & Adm. News (1954) 4802), thus providing fresh evidence that Congress intends state personnel to be included under the general terms of revenue acts. In short, the rule is not that asserted by petitioner—that a state is included in the term "person" only in special cases (Br. 14); it is the direct opposite so far as revenue measures are concerned—that, to effect uniform application, state officers and employees and even a state itself are included in general terms, such as the word "person", unless they are expressly exempted.

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stored, in Revenue Act of 1918, c. 18, 50 Stat. 1057, the House Ways and Means Committee stating that "in all equity and justice such officials should be subject to income taxes and that, if necessary, this matter should be definitely decided by the courts." H. Rep. No. 767, 65th Cong., 2d Sess. (1918) 9 (1939-1 Cum. Bull. (Part 2) 86, 92. See Powers of Congress to Tax the Interest From State and Local Securities and the Compensation of State and Local Employees, Report to the Joint Committee on Internal Revenue Taxation (1939), p. 38.

The petitioner's reliance upon Section 3401(c) (Br. 11–12) is misplaced. That Section of the Code [14] deals with the withholding of taxes from wages of specified classes of employees, and subsection (*c*) expressly includes wages of officers and employees of the United States and of the states. This express inclusion arises out of the special context of Section 3401. The collection of taxes by withholding from wages was a novel device originated by the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126. The withholding provisions were added at that time as a subchapter to Chapter 9—Employment Taxes of the 1939 Code—since these latter taxes already established the mechanism of withholding as a payroll deduction by the employer. The social security employment taxes, however, expressly exempted federal and state officers and employees (1939 Code Section 1607(c)(6) and (7)), since they were exempt from the original social secu-

[14] See the following:

SUBTITLE C—EMPLOYMENT TAXES

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CHAPTER 24—COLLECTION OF INCOME TAX AT SOURCE ON WAGES

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SEC. 3401. DEFINITIONS.

* * * * * *

(c) *Employee.—For purposes of this chapter*, the term "employee" includes an officer, employee, or elected official of the United States, a State, Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation. [Italics supplied.]

(26 U.S.C., Supp V, 3401.)

rity act programs of old age and unemployment insurance benefits. In adapting these provisions to income tax withholding, it was necessary to expressly include both groups, since both were subject to federal income taxation. No such special problem was presented by Section 6332: as we have seen, it simply strengthened by like general terms the all-inclusive language of lien and levy dating from 1866.[15]

Since the structure and purpose of Section 6332 of the Code is such that a state should be considered a "person" in the same way as any other entity and since in most situations a state is considered a "person" under the tax laws of the United States, West Virginia should be considered as within the scope of the statute.

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[15] There is another statutory reference to salaries of state employees worth noting: the special provision of Section 1211 of the Revenue Act of 1926, *supra*, which provided that:

> Any taxes imposed by the Revenue Act of 1924 or prior revenue Acts upon any individual in respect of amounts received by him as compensation for personal services as an officer or employee of any State or political subdivision thereof (except to the extent that such compensation is paid by the United States Government directly or indirectly), shall, subject to the statutory period of limitations properly applicable thereto, be abated, credited, or refunded.

But this is an express provision of *exemption* from tax, of historical importance only, which was placed in the law to relieve employees of municipal waterworks, lighting plants, and similar activities who were held to be non-governmental employees outside the then prevailing immunity, by Treasury regulations, before *Brush* v. *Commissioner*, 300 U.S. 352. See Report to the Joint Committee on Internal Revenue Taxation, *op. cit.*, *supra*, note 13, p. 38.

C. THERE IS NO BURDEN ON THE STATE AND THEREFORE NO CONSTITUTIONAL IMMUNITY OR PROHIBITION AGAINST LEVYING UPON STATE EMPLOYEES' SALARIES

As the court below stated (R. 35), there is no Constitutional requirement that the salaries of state employees be treated differently from the salaries of others. Viewed as income, the salaries of state officers and employees are subject to federal taxation, no impairment of state sovereignty being involved. *Helvering* v. *Gerhardt,* 304 U.S. 405; *Graves* v. *N.Y. ex rel. O'Keefe,* 306 U.S. 466. Thus, public officers and employees are to be treated the same as all other citizens in respect of bearing their share of the financial burdens of government.[16] In the present context the salaries of state employees are viewed as property or property rights and the question is whether they are subject to levy for unpaid federal taxes. But the same considerations which authorize federal taxation of such salaries authorize the collection of unpaid taxes from such salaries. A tax that cannot be collected is no tax at all (*United States* v. *Snyder,* 149 U.S. 210), the imposition and collection of a tax being inseparable under the Constitutional power of Congress "to lay and collect Taxes" (Art. I, Sec. 8, Appendix A, *infra, p.* 41). The statutory procedures of lien and levy are essential measures of tax collection. *Michigan* v. *United States,* 317 U.S. 338. Since there

[16] There are now a total of 5,608,000 state and local government officers and employees in the United States. Department of Commerce, Bureau of the Census, *Summary of Public Employment*, Vol. II, No. 1 (1957 Census of Governments) p. 13. This includes executive officers, legislators, and judges as well as employees (p. 3).

is no Constitutional immunity against the taxation of salaries of state employees, there is likewise no Constitutional immunity, so far as the individual taxpayer is concerned, against collection of unpaid taxes out of salaries paid by a state. Indeed, even specific state exemptions from levy are ineffective for federal tax purposes. *Fried* v. *New York Life Insurance Co.*, 241 F. 2d 504 (C.A. 2), certiorari denied, 354 U.S. 922; *Shambaugh* v. *Scofield*, 132 F. 2d 345 (C.A. 5); *Jones* v. *Kemp*, 144 F. 2d 478 (C.A. 10).

Nor do levies upon the salaries of state employees impose any unconstitutional burden on the states or on state officials. A federal tax may even be laid upon the state itself in respect of any activity which is not an essential governmental function. *Allen* v. *Regents*, 304 U.S. 439; *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411. As to levies upon the salaries of state employees, state officials are "merely collectors" of a tax laid on private persons and no burden at all on the state is involved. See concurring opinion of Justices Reed, Stone, and Black in *Allen* v. *Regents*, *supra*, p. 456. It would be strange indeed if the federal government were denied its paramount right to collect taxes through levy upon the salaries of state employees when, as already noted (*supra*, pp. 19–21), 32 states allow private creditors to garnishee the salaries of public employees. As far as the state is concerned, a levy upon the state paymaster simply directs him to pay the accrued salary of the delinquent taxpayer over to the United States in satisfaction of the employee's unpaid taxes. The money belongs to the employee, it is his property, and the

only interest of the state is that it shall be paid over to the employee or to his account in such a way that the liability of the state to pay compensation for services rendered is discharged by payment. *Ross* v. *Rich*, 210 Ark. 74. This interest is fully satisfied by compliance with the tax levy, for it is clearly settled that "payment to the government pursuant to the levy and notice is a complete defense to the debtor against any action brought against him on account of the debt." *Bank of Nevada* v. *United States*, 251 F. 2d 820, 828 (C.A. 9), certiorari denied, 356 U.S. 938; *United States* v. *Eiland*, 223 F. 2d 118, 122 (C.A. 4).

II

THE PETITIONER WAS PERSONALLY LIABLE FOR DISREGARDING THE DEMAND TO SURRENDER THE FUNDS TO THE UNITED STATES

A. SECTION 6332 OF THE INTERNAL REVENUE CODE APPLIES TO THE PETITIONER AND IMPOSES PERSONAL LIABILITY FOR HIS REFUSAL TO HONOR THE DEMANDS SERVED ON HIM

The petitioner, who was the state auditor of West Virginia, does not deny that if any state official could be required to turn over the accrued salary of the state employees to the Internal Revenue Service, he was that official. As auditor it was his duty to issue warrants on the state treasury authorizing the payment of money. *Board* v. *Sims*, 136 W. Va. 789;

Board of Governors v. *Sims*, 140 W. Va. 64.[17] Moreover, it is not denied that he was personally served with the demand to surrender, that he had full knowledge of the claims of the United States, and that the statutory provision imposing personal liability for disregarding the demand was included in the notices (*supra*, pp. 6–7). The question narrows down, therefore, to whether a person responsible for making payments from a state's treasury who disregards a demand to surrender accrued salaries to satisfy delinquent taxes is personally liable.

In the first place, it is clear that under the structure of Section 6332 there is a Congressional intention to impose personal liability on an agent who refuses to respect a demand served upon him. Thus Section 6332(b), *supra*, p. 3, provides that a person refusing to comply "shall be liable in his own person and

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[17] 1 West Virginia Code of 1955, § 1019 provides:

Every person claiming to receive money from the treasury of the State shall apply to the auditor for a warrant for same. The auditor shall thereupon examine the claim, and the vouchers, certificates and evidence, if any, offered in support thereof, and for so much thereof as he shall find to be justly due from the State, if payment thereof be authorized by law, and if there be an appropriation not exhausted or expired out of which it is properly payable, he shall issue his warrant on the treasurer, specifying to whom and on what account the money mentioned therein is to be paid, and to what appropriation the same is to be charged. * * *

estate." And, while Section 6332(c), *supra*, p. 4, in defining "person", deals with persons acting for corporations or partnerships specifically, it clearly embodies the theory that the natural person who performs the act involved is to be held liable.[18] The fact that this subsection specifically refers only to corporations and partnerships cannot be construed to negative liability on the part of an agent of a state. Cf. *Ohio* v. *Helvering*, 292 U.S. 360, 370–371.

There is no merit in petitioner's argument that Section 6332 should be strictly construed, and thus as excluding a state officer, because the statute is penal in nature. Actually, although subsection (b) is entitled "Penalty for Violation", the liability imposed is not a penalty in any criminal sense. It is a simple liability for and in the amount of the conversion of another's property, akin to the established liability of a garnishee who, after due notice, lets the garnished property escape the creditor's right to it. *Brashear* v. *West*, 7 Pet. 608, 618. It is a civil liability only. S. Rep. No. 52, 69th Cong., 1st Sess., p. 38, *supra*, p. 22, n. 11; Cf. *Helvering* v. *Mitchell*, 303 U.S. 391. Since the statute is comprehensive and in terms provides no exemption from that civil liability, no exemption therefrom can be implied as a matter of construction.

The petitioner asserts that whatever the legal liability of an agent of a private corporation may be, he

[18] In the case of a state, the imposition of liability on the agent may be necessary in order to obtain any recovery since the principal might often be able to escape liability on the ground that it had not given its agent authority to contravene federal law. Cf. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 686–688, rehearing denied, 338 U.S. 840.

may not, as a state officer, be held personally liable for performing his official duty (Br. 24–28). In making this argument, the petitioner relies primarily on *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A. D.C.) certiorari denied, 305 U.S. 643, rehearings denied, 305 U.S. 673, 307 U.S. 651, which upholds the freedom of a public official from liability to individuals for exercising discretion vested in him by law. That very case recognizes that officials may be liable for failing to carry out duties when the discretionary element is lacking. 99 F. 2d 135, 137. And the petitioner himself does not argue that Congress may not impose personal liability on a state official for impeding the collection of federal taxes (Br. 27).

Contrary to the assumption of the petitioner, it has been held that a state officer, employee or agent is to be held accountable individually for the collection or payment of a federal tax. *South Carolina* v. *United States*, 199 U.S. 437; *Allen* v. *Regents*, 304 U.S. 439. Even with respect to criminal liability, it has been held that a state officer cannot escape on the ground that he was performing his official duty. *Clendennin* v. *United States*, 265 Fed. 412 (C.A. 4). There the conviction of a state prohibition officer for carrying on the business of a retail liquor dealer without having paid the federal tax was affirmed, the court stating at 413:

> He could not escape the penalty of the federal law on the ground that his intention in the transaction was to promote the enforcement of the state laws. Even if he had acted under express official authority from the state of West

> Virginia, he could not deal in liquor, directly or indirectly, either alone or in conjunction with Nutter, without paying the special tax required by the federal statute. * * *

The statute, as applied to petitioner, is of course coercive in the sense that it makes him personally liable for the amount of taxes which he prevented the Government from collecting. But such a liability is a necessary incident to the federal power to collect taxes, as to state officers no less than others. And it is the very fact that revenue laws should be given uniform application that justifies the rule that state officers are not to be impliedly excluded from the operation of a statute which uses language sufficiently comprehensive to include them. To contend, as the petitioner does, that the federal government has not imposed an obligation upon him to aid in the collection of taxes, and personal liability for a refusal to fulfill that obligation, is to assert that, without any indication of or reason for doing so, Congress has by implication restricted its power to collect taxes from state employees. Here, no less than in other contexts, there is no reason to exempt a state or state official "from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States* v. *California*, 297 U.S. 175, 186; *California* v. *Taylor*, 353 U.S. 553, 562–563.

B. NO PROBLEM OF FEDERAL-STATE RELATIONS IS INVOLVED IN THE IMPOSITION OF PERSONAL LIABILITY ON THE PETITIONER FOR HIS REFUSAL TO HONOR THE LEVIES

Some of petitioner's arguments imply that the application of Section 6332 poses a problem in federal-state relations. One such argument is that, if he heeded the notices of lien and levy, he risked violation of state law governing his disbursement of state funds, which do not provide for federal liens and levy (Br. 22–23). But that argument is without substance. The silence of the state laws does not suggest any repugnance to or conflict with federal statutes, since the collection of federal taxes is not the states' responsibility; the authority for the federal lien and levy lies wholly in the federal statutes. *United States* v. *Acri*, 348 U.S. 211; *United States* v. *Knott*, 298 U.S. 544.

The petitioner complains that he, in good faith and on legal advice and believing that he was bound by state law to do so, paid the accrued salaries to the delinquent taxpayer-employees and now finds himself subject to personal liability for violation of a federal statute as a result of his action in discharge of his official duties under state law (Br. 25–27). But the facts show there is no excuse for his present situation. He was given express notice that the United States had a lien on the accrued salaries of the delinquent employees, that the accrued salaries constituted property belonging to the United States, that the United States claimed possession of the accrued salaries and

demanded their surrender. In addition, he was specifically notified that if he failed to surrender the accrued salaries he would be held personally liable, as provided by statute. He nevertheless deliberately assumed the risk of personal liability when he chose to ignore the notices and paid out the salaries to the employees. The excuse that his wrongful action was taken in good faith, in reliance upon legal advice, cannot be accepted. In the first place, even under West Virginia law, he is not relieved from personal liability for action as a state officer merely because he acted on legal advice. See *Matthews* v. *Anderson,* 127 W. Va. 147, 152. Secondly, petitioner needlessly violated the federal law. The state law did not compel him to pay out the salaries and, if he had doubts as to the proper course, as he says (Br. 25), he could have held the warrants and awaited a judicial determination of the allegedly conflicting claims of the United States and of the employees. He would have been at that point "a mere stakeholder." *Railroad Co.* v. *Rogers,* 52 W. Va. 450, 466. Had he taken that course, his personal liability would have been a technical one only, to make certain that the salaries were not paid out in defeat of the lien and levy. Thus, his present personal liability does not arise out of the performance of his official duties, but out of his knowing disregard of a federal statute essential to the collection of federal taxes. It is an old rule that the disobedience of a statutory duty "is always at the peril of the party disobeying, whether a private individual, or a public officer or a board of public officers." *Clark* v. *Miller,* 54 N.Y. 528. See *Board of Governors* v. *Sims,* 140 W. Va. 64, 77.

The petitioner's complaint in this connection is reduced to the fact that he has incurred personal liability for action which he says he took on advice of the Attorney General of the state. Whether his wrongful act was his own or should be attributed to the state has a bearing on a feature of the case which is strictly personal between petitioner and the state—whether he will or should receive reimbursement from the state for payment of the liability he incurred in refusing to honor the federal levies. That is not a question to be decided by this Court, but we note that it may be possible for the state to reimburse petitioner. It has been held lawful for a state to "indemnify their officers against liability which they may incur in the *bona fide* discharge of their duties * * * even though the result may show that the officers exceeded their legal authority." Mechem, *Public Offices and Officers* (1890) Sec. 879.

As we have already shown (*supra,* pp. 30–32), there is no Constitutional immunity or other prohibition against a federal levy upon the accrued salaries of State employees. No unconstitutional burden is placed on a State by requiring it, like any other employer, to aid in the collection of federal taxes by honoring levies on the accrued salaries of employees. Indeed, when under State law the salary of an employee has accrued and become payable (the stipulated fact here) it becomes the property of the taxpayer and the state paymaster has no interest therein except the ministerial duty of seeing that it is paid to the employee or to his account. ***Board of Governors*** **v.** ***Sims,*** **140 W. Va. 64.**

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

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Attorneys.

JANUARY 1959.

APPENDIX A

Constitution of the United States:

ARTICLE I

* * * * *

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

ARTICLE VI

* * * * *

Clause 2. This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

Internal Revenue Code of 1954:

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) *Enumeration.*—There shall be exempt from levy—

(1) *Wearing Apparel and School Books.*—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) *Fuel, Provisions, Furniture, and Personal Effects.*—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) *Books and Tools of a Trade, Business, or Profession.*—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

* * * * *

(c) *No Other Property Exempt.*—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(26 U. S. C., Supp. V, 6334.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

* * * * *

(26 U.S.C., Supp. V, 7403.)

Treasury Regulations Relating to Assessment, Collection, Abatement, Credit, and Refund of Taxes (1954):

Sec. 301.6331–1. Levy and Distraint—(a) Authority to levy—* * *

* * * * *

(4) Certain types of compensation—* * *

(ii) State and municipal employees.—Accrued salaries, wages, or other compensation of any officer, employee, or elected or appointed official of a State or Territory, or of any agency, instrumentality, or political subdivision thereof, are also subject to levy to enforce collection of any Federal tax.

* * * * *

APPENDIX B

Form 668-C (REV. JAN. 1968)	U. S. TREASURY DEPARTMENT · INTERNAL REVENUE SERVICE **FINAL DEMAND**
DISTRICT	DATE

TO:

On _____, 19__, there was served upon you a levy, by leaving with _____ at _____ a notice of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by _____ of _____, who was at the time, and still is, indebted to the United States of America for unpaid internal revenue taxes, together with statutory additions which had accrued thereon at the time of levy, and which amounted at that time to the sum of $_____. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

Your attention is invited to the provisions of Section 6332, Internal Revenue Code of 1954, as follows:

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty For Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, $_____, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as au-

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

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(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, $_____, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as authorized by the statute quoted above.

DISTRICT DIRECTOR OF INTERNAL REVENUE	BY *(Signature)*	TITLE

CERTIFICATE OF SERVICE

I hereby certify that this Final Demand was served by handing a copy thereof to:

NAME	TITLE	
PLACE	DATE	TIME
COLLECTION OFFICER *(Signature)*		DATE

U. S. GOVERNMENT PRINTING OFFICE: 1959